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15

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA

18

19 JENNIFER MARINO, and on behalf  
20 of those similarly situated,

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22 Plaintiff,

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24 v.

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26 YUMMYEARTH, INC.,

27

28 Defendant.

CASE NO. 3:22-cv-02739-VC

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION FOR  
SANCTIONS**

Date: September 14, 2023

Time: 10:00 AM

Courtroom: 4

The Honorable Vince Chhabria

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1           **I. INTRODUCTION**

2           Defendant's Motion should be denied for multiple reasons.

3           It should be rejected because it is an improperly raised discovery motion. The  
4 Court referred all discovery disputes to United States Magistrate Judge Laurel  
5 Beeler. Judge Beeler has a detailed procedure for handling discovery disputes.  
6 Defendant failed to comply with the necessary steps meant to facilitate resolution  
7 prior to these issues being presented before this Court.

8           In an attempt to resolve multiple outstanding discovery issues, Plaintiff's  
9 counsel reached out to defense counsel to have a fruitful conversation to resolve all  
10 discovery disputes.<sup>1</sup> Instead of speaking on the phone, in person, or via  
11 videoconference, defense counsel filed this motion 34 minutes after the request was  
12 sent by Plaintiff's counsel. This comes as no surprise because Defendant's counsel is  
13 known in many federal districts – including the Northern District of California - for  
14 raising phantom sanctions issues and related discovery motions as part of its  
15 "scorched-earth practice."<sup>2</sup> By failing to make *any* effort to comply with the Court's  
16 discovery procedures, Defendant's motion should be denied.

17           Additionally, Defendant's request for relief should be rejected because the  
18 current difficulties with scheduling Plaintiff's deposition were created by Defendant.  
19 Fewer than 24 hours before Plaintiff's scheduled remote deposition, Defendant  
20 unilaterally canceled the deposition and drastically shifted the format from remote to  
21 in-person at defense counsel's office in San Francisco.<sup>3</sup> Throughout the entire

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22           <sup>1</sup> Exhibit C.

23           <sup>2</sup> Exhibit G, at 1.

24           <sup>3</sup> Exhibit E.

1 discussion about Plaintiff's deposition, Defendant had consistently offered (rather  
 2 than Plaintiff demanding) a remote format.

3 June 5, 2023, marked the first time that an in-person deposition was requested  
 4 or discussed. Plaintiff was ready to sit for her remote deposition on June 6, 2023.  
 5 Moreover, Plaintiff was willing to sit for a remote deposition on subsequent dates  
 6 suggested by Defendant including July 11, 2023. Notably, Defendant fails to include  
 7 these material facts in its Motion in order to make it appear that Plaintiff is avoiding  
 8 her deposition. Once again, this is not surprising, as Defendant's counsel is known for  
 9 intentionally creating confusion and delay by shifting deposition dates and locations.<sup>4</sup>  
 10

11 Plaintiff no longer resides within the Northern District of California. Instead,  
 12 presently – and at the time of her previously scheduled deposition in June 2023 – she  
 13 resides in Massachusetts. Plaintiff is ready, and willing to be deposed remotely. The  
 14 insistence of Defendant to take Plaintiff's deposition in-person is unnecessary, given  
 15 that the Plaintiff may be deposed remotely. Defendant's Motion should be denied.  
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17 **II. ARGUMENT**

18       **A. Defendant's Motion Should Be Denied Because It Is  
 19           Procedurally Improper Because It Violates This Court's  
 20           Discovery Order.**

21 Defendant's motion attempts to resolve a discovery dispute – created by  
 22 Defendant – under the guise of a motion for sanctions. This violates this Court's  
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 25 <sup>4</sup> Judge Alsup was disappointed in defense counsel's similar actions in his court.  
 26 *Clark v. The Hershey Company*, 3:18-cv-06113-WHA, Transcript of Proceedings of  
 27 March 4, 2019, ECF No. 51, at 19:22-20:1 ("It is crystal clear you're doing this to run  
 28 up the cost and impose this burden on the plaintiffs. That's all that's going on here.  
 I'm very disappointed that defense counsel in this case and that [defendant] would do  
 such a thing.") (attached as Exhibit F).

1 procedure because Defendant failed to proceed with the necessary steps to resolve its  
2 discovery dispute with the Court.

3 All discovery disputes were referred to U.S. Magistrate Judge Laurel Beeler  
4 (Doc. No. 42). Judge Beeler's Standing Order provides a clear path to resolve any  
5 discovery dispute (Doc. No. 43-1, at 2-3). "The parties may not file formal discovery  
6 motions." *Id.* Rather, Judge Beeler requires a detailed procedure that attempts to  
7 resolve the dispute before it appears before any United States Magistrate Judge or  
8 United States District Judge.

9 Those steps were not taken before the filing of Defendant's sanctions motion  
10 which is an improperly filed discovery motion styled as a request for sanctions. There  
11 were no in-person, telephonic, or videoconference meet-and-confer discussions nor  
12 any attempt to craft a joint letter brief. *See* Keeton Declaration, ¶¶ 7-10. Instead,  
13 Plaintiff's counsel – knowing that there were multiple discovery issues involving  
14 written discovery and the location of Plaintiff's deposition – reached out to defense  
15 counsel in an attempt to speak on the phone to have a fruitful discussion and  
16 potentially resolve the disputes.<sup>5</sup> 34 minutes later, defense counsel responded with  
17 this Motion. *See* Keeton Declaration, ¶¶ 6-7.

18 This "rush to Chambers" approach is not new. Defense counsel has a pattern of  
19 bringing improper sanction motions. A simple search on Westlaw of sanctions  
20 motions filed by Defendant's counsel reveals a *recurring* strategy to reframe  
21 litigations and deflect attention by lodging accusations of wrongdoing against  
22 opposing counsel and parties. Some courts have simply rejected the accusations—

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<sup>5</sup> See Exhibit C (sent at 12:50PM PT).

often targeted at obtaining sanctions in the form of favorable evidentiary inferences. *See, e.g., Walker v. B&G Foods, Inc.*, No. 15-cv-03772-JST, 2019 WL 3934941, at \*4 (N.D. Cal. Aug. 20, 2019) (denying Defense counsel’s motion to sanction opposing counsel); *Stone Brewing Co., LLC v. Miller Coors LLC.*, No. 18cv331-BEN(LL), 2019 WL 4450754, at \*7 (S.D. Cal. Sept. 17, 2019) (denying Defense counsel’s motion for evidentiary sanctions); *In re ComUnity Lending Inc.*, No. C 08-00201 JW, 2011 WL 7479165, at \*1-2, \*6 (N.D. Cal. June 6, 2011) (denying Defense counsel’s motion for evidentiary sanctions); *S.E.C. v. Small Business Capital Corp.*, No. 5:12-cv-03237 EJD, 2012 WL 6584953, at \*1-2 (N.D. Cal. Dec. 17, 2012) (denying Defense counsel’s motion for sanctions). Others have expressly warned Defense counsel against premature or unfounded Rule 11 motions. *See, e.g., Katziff v. Beverly Enterpr. Inc.*, No. 07-11456-NMG, 2009 WL 10729569, at \*3-4 (D. Mass. Apr. 17, 2009) (advising “to proceed properly and to refrain from filing motions for sanctions without due consideration.”). Even upon review, the Court should conclude similarly as the Special Master in *Silver v. BA Sports* concluded when similar arguments were raised by Defendant’s counsel, “There is no shred of evidence or legal support that would come close to justifying dismissal for this tawdry discovery dispute.”<sup>6</sup>

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<sup>6</sup> Exhibit I, at 3.

**B. Defendant's Motion Should Be Denied Because Defense Counsel Distorts the Facts and Attempts to Implement Its "Scorched Earth" Tactics Which Have Been Admonished in Courts Throughout the Country.**

Even if Defendant's Motion complied with the Court's procedure for discovery disputes, the Motion should still be denied because Defendant intentionally misrepresents the facts to the Court.

On May 8, 2023, both sides agreed to have Plaintiff's deposition taken on June 6, 2023 at 10:00AM PT, and it was to be conducted remotely via Zoom.<sup>7</sup> On June 5, 2023, at 11:12AM, Defendant unilaterally cancelled the deposition for no apparent reason and then required that it occur in-person in San Francisco. For almost a month, Plaintiff's deposition was agreed to be conducted via Zoom on June 6. During all discussions about Plaintiff's deposition, Defendant offered for it to occur via Zoom. Then, less than 24 hours before the deposition, Defendant unilaterally cancelled the deposition and stated that Plaintiff's deposition would now be conducted only in person in San Francisco. All subsequent discussions about appearing via Zoom were ignored or rejected by defense counsel. Plaintiff no longer lives in California nor was she planning on being in California during the next few months because she now lived in Massachusetts. Defendant was notified of this prior to the scheduled deposition date, and that she was going to be unable to appear physically in California, but she was willing to conduct the deposition via Zoom consistent with all discussion and agreements prior to Defendant's shift less than 24 hours before her scheduled deposition. The eleventh-hour cancellation and uncompromising shift in

7 Exhibit D.

1 deposition format was solely an attempt to burden the Plaintiff, as defense counsel  
 2 offered no reasoning for such a drastic shift. Defense counsel's deposition tactics have  
 3 been admonished by multiple Courts. For example, in a case where defense counsel  
 4 confusingly shifted deposition dates and locations, Judge Alsup stated, "It is crystal  
 5 clear you're doing this to run up the cost and impose this burden on the plaintiffs.  
 6 That's all that's going on here. I'm very disappointed that defense counsel in this case  
 7 and that [defendant] would do such a thing."<sup>8</sup>

8 These tactics are not new, but rather, they are part of defense counsel's  
 9 *continuing* "scorched-earth practice."<sup>9</sup> From coast to coast, federal judges have grown  
 10 tired of these tactics. As Judge Illston directed to defense counsel, "I've read your  
 11 papers, which were extremely vitriolic. I find that off-putting, and I hope that in  
 12 future you can make them less so. The *ad hominem* attacks are not useful. These are  
 13 hard enough questions without having to deal with such childish accusations. So,  
 14 please, calm down in the future."<sup>10</sup> Recently, a federal judge in the Northern District  
 15 of Illinois was concerned by defense counsel's use of a deceptively presented product  
 16 label during a plaintiff's deposition in a food mislabeling case.<sup>11</sup> In at least one

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 21 <sup>8</sup> *Clark v. The Hershey Company*, 3:18-cv-06113-WHA, Transcript of Proceedings of  
 22 March 4, 2019, ECF No. 51, at 19:22-20:1 (attached as Exhibit F).

23  
 24 <sup>9</sup> See Exhibit G, p.4n.1 ("Magistrate Judge Orenstein wrote that he found the  
 25 behavior of counsel for the defendants, which involved 'an unrelenting effort to tar  
 26 opposing counsel with unproven allegations of irrelevant misconduct from decades in  
 27 the past,' shocking.").

28 <sup>10</sup> *Silver v. BA Sports Nutrition*, 3:20-cv-00633-SI, Transcript of Proceedings of Sept.  
 29 4, 2020, Doc. No. 57, at 3:12-21.

30  
 31 <sup>11</sup> *Strow v. B&G Foods*, 1:21-cv-05104, Doc. No. 69 ("What, exactly, did defense  
 32 counsel know about the new label when counsel showed that picture to Plaintiff at  
 33 the deposition? Did defense counsel know that the label was new? Did defense  
 34 counsel know that the new label did not exist when the lawsuit was filed? Who found  
 35 that picture, and decided to show it to Plaintiff, and why?").

1 instance, a federal judge required defense counsel's client attend a hearing to confirm  
 2 that defendant was aware that defense counsel's behavior was something that he'd  
 3 "never seen anything quite so bad in over 30 years as a lawyer."<sup>12</sup>

4 Here, defense counsel's actions created the problem it now runs to the Court to  
 5 remedy. The Court's time should not be wasted by addressing problems created by  
 6 the party now seeking its assistance.

8

9 **C. Defendant Cannot Force Plaintiff to Be Deposed in California.**

10 To support its assertion that Plaintiff – despite no longer living in the State of  
 11 California – must appear for an in-person deposition in San Francisco, Defendant  
 12 cites to three district court cases from years before the COVID-19 pandemic started.  
 13 The world is a different place. *See Schaeffer v. City of Chicago*, 2021 WL 3673847, at  
 14 \*1 (N.D. Ill. Jan. 22, 2021) (noting the "the ubiquity of Zoom depositions during the  
 15 time of COVID-19."). Many court proceedings are now conducted remotely that would  
 16 never have been contemplated in a pre-COVID environment. Nevertheless,  
 17 Defendant is aware of the benefits of remote depositions because Defendant offered  
 18 that option for Plaintiff at *every* mention of her deposition until June 5, 2023 before it  
 19 unilaterally cancelled her previously scheduled remote deposition less than 24 hours  
 20 before it was to commence.

21 Plaintiff no longer lives in the State of California. On June 5, 2023, she was  
 22 living in Massachusetts without any scheduled visits to California for many months.

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<sup>12</sup> *Pasik v. Boon Technologies*, , 1:19-cv-02357-FB-JO, Transcript from January 10,  
 2020 (Doc. No. 42), at 3:8-9 (E.D.N.Y.) (Exhibit H).

1 Defendant was informed that Plaintiff no longer resided in California nor would she  
2 be physically present in the state. Plaintiff currently lives in Massachusetts. Plaintiff  
3 is ready, and willing to be deposed remotely as has been agreed upon for months.  
4 The insistence of Defendant to take Plaintiff's deposition in-person is unnecessary,  
5 given that the Plaintiff may be deposed remotely.  
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8 **III. CONCLUSION**

9 Plaintiff respectfully asks that the Court deny Defendant's Motion in its  
10 entirety because it is procedurally improper and premised on incomplete facts.  
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13 Dated: August 9, 2023

14 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of August, 2023, a true and correct copy of this Opposition was filed with the Court via the Electronic Case Filing System, and was served on all counsel of record through the same means.

/s/ Steffan T. Keeton

Steffan T. Keeton

GOOD GUSTAFSON AUMAIS LLP